

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5575

PETITION OF TIM DRISCOLL
(Hearing held May 9, 2001)

OPINION OF THE BOARD
(Effective date of Opinion, July 31, 2001)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for variances from Sections 59-C-1.326(a)(3) and 59-C-1.326. The petitioner seeks a variance of 9.50 feet as the existing accessory structure (two-story guesthouse) exceeds the fifteen (15) foot height requirement. The existing accessory structure also requires a variance as it is located in the side yard and Section 59-C-1.326 requires accessory structures to be located in the rear yard only.

Martin J. Hutt, Esquire, and Harry W. Lerch, Esquire, represented the petitioner at the public hearing. Ruth Cross, an adjoining neighbor on Lots 16 and 17, and Captain Claude Cross, Ms. Cross' son, appeared at the public hearing in opposition to the variance request.

The subject property is Lot 13, Block 9, Bradley Hills Subdivision, located at 5401 Bradley Boulevard, Bethesda, Maryland, in the R-90 Zone (Tax Account No. 00445885).

Decision of the Board: Requested variances **denied**.

EVIDENCE PRESENTED TO THE BOARD

1. The existing accessory structure/guesthouse is located in the northwest section of the property.
2. Mr. Hutt stated that the Driscoll residence was originally constructed in 1938 and that the guesthouse was also constructed about the same time as the original residence.
3. Mr. Hutt stated that the lots in this area are significantly larger than the minimum requirement for the typical R-90 zoned lots. Mr. Hutt stated that the required setbacks have changed within the last 2 to 3 years and that the prior zoning regulations permitted accessory structures to be located 2 feet from the property line.
4. Mr. Hutt stated that he disagrees with the Department of Permitting Services' (DPS) interpretation of the amount of variance required. Mr. Hutt stated that the variances are required to expand the existing footprint of the guesthouse to provide handicap access.
5. Mr. Driscoll testified that the renovation of the guesthouse was started without a building permit because his contractor was from West Virginia and was not knowledgeable about the County's building requirements. Mr. Driscoll testified that

the exterior construction has been completed and the interior construction still needs to be done. See, Exhibit No. 19.

6. Mr. Driscoll testified that an elderly family member would use the guesthouse and that the construction would allow for mobility and a handicap ramp to provide accessibility to the guesthouse.
7. Mr. Driscoll testified that he has resided at the property since 1993, and that the guesthouse existed when he purchased the house. Mr. Driscoll testified that the guesthouse is a two-story structure with three bedrooms. Mr. Driscoll testified that he has spoken with his neighbors and that the neighbors he spoke with support the variance request. Mr. Driscoll testified that he did discuss the variance request with Ms. Cross, an adjoining neighbor on Lots 16 and 17.
8. Mr. Driscoll testified that the guesthouse is located approximately 220 feet from Bradley Boulevard and that the topography of the property slopes and is comprised of extensive rock outcroppings as shown in Exhibit Nos. 16, 17 and 18.
9. Mr. Driscoll testified that he requested a tree service remove several dead trees located on his property and that the tree service personnel mistakenly removed a tree on the Cross property.
10. Peter Donovan, the petitioner's architect, testified that the construction to the guesthouse was done on the original foundation, and includes an addition. Mr. Donovan testified that repairs were made to the roof and alterations were done to the guesthouse to match the petitioner's residence.
11. Mr. Donovan testified that an addition could not be added in the side yard because of the uphill rock outcroppings. Mr. Donovan testified that an addition at the front of the guesthouse would interrupt the pattern of the house and require that the access to the guesthouse be changed.
12. Mr. Donovan testified that the existing stairs in the guesthouse were similar to a ship's stair and did not comply with the current Zoning Ordinance standards and had to be changed to comply.
13. Mr. Donovan testified that the height of the guesthouse is 16 feet, which is 1 foot higher than the original guesthouse. Mr. Donovan testified that the length of the guesthouse is 29.6 feet and that the building is located 13 feet from the northwest side yard boundary and 4 feet from the northeast side yard boundary.
14. Captain Cross testified that his mother's house was built in 1940 and that she has resided in the home for 61 years. Captain Cross testified that he contacted DPS about the construction on the Driscoll property.
15. Captain Cross testified that his mother had given permission to the tree service personnel to only remove a few limbs that overhung from her tree onto the petitioner's property. See, Exhibit No. 21(a) through 21(c). Captain Cross testified that the construction to the guesthouse is not built on its original foundation and that the guesthouse should be restored to its original footprint. Captain Cross testified that the new construction has expanded the footprint of the guesthouse and that the variances should be denied.
16. Mr. Hutt stated in his closing arguments:
 1. that the guesthouse has existed since 1940;

2. that he disagrees with DPS in its interpretation of the amount of the variance needed;
3. that the property is a heavily wooded lot and that the existing trees provide screening for the existing structure;
4. that the guesthouse is located 200 feet away from street and that the view of the guesthouse is blocked by a neighboring accessory structure; and
5. that as noted in the architect's testimony, the expansion to the guesthouse at any other direction would be costly and would affect the functionality of the guesthouse. Mr. Hutt notes that several of the adjoining neighbors support the variance request and that the property adjoins an unimproved lot.

FINDINGS OF THE BOARD

Based upon the petitioner's binding testimony and the evidence of record, the Board finds that the variances must be denied. The requested variances do not comply with the applicable standards and requirements set forth in Section 59-G-3.1(a) as follows:

(a) By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property.

1. The removal of the Cross tree, the interpretations of DPS, the cost of construction, and the internal functionality of a residence are not areas that are within the jurisdiction of the Board.
2. The Board finds that the alterations to the guesthouse were made within the last year and were not constructed with a valid building permit. These conditions are not consistent with the findings in Courts and Judicial Proceedings Article, Section 5-114, for structures built with a valid building permit, which bars the government from proceeding against a structure, in violation of the setback restrictions, which has been in existence for more than 3 years. Cf., *Cromwell v. Ward*, 102 Md. 691, 722-726 (1995).
3. The Board finds that the petitioner's lot is not unique in that the slope of the topography and the existing rock outcroppings are characteristics shared by the neighboring properties.
4. The Board further finds that the slope of the property is not unusual or peculiar in such a way that would prohibit construction to the existing guesthouse.

Since the petition does not meet the requirements of Section 59-G-1.3(a), the Board finds that it does not need to consider the other requirements for granting a variance. Accordingly, the requested variances: of 9.50 feet from the required 13.50 foot side lot line setback and the requirement that accessory structures are to be located in the rear yard only are denied.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L. Barron and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the foregoing Resolution. Board member Mindy Pittell Hurwitz was necessarily absent and did not participate in this Resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 31st day of July, 2001.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland